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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 339

HENRY S. LONG, CHAIRMAN, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS MEMBERS COMPRISING THE STATE TAX COMMISSION OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION AND STATEMENT AS TO JURISDICTION.

A. A. CARMICHAEL,
Attorney General of Alabama;
RAY RUBBTON,
CHAS. C. TRABUE, JR.,
Counsel for Appellants.

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the United States the statement as to jurisdiction heretofore deposited with the Clerk on September 10, 1938.

A. A. CARMICHAEL,
Attorney General, State Capitol,
Montgomery, Alabama;
RAY RUSHTON,
Special Attorney for State Tax
Commission of the State of Alabama,
Bell Building, Montgomery, Alabama;
CHAS. C. TRABUE, JR.,
Attorney for Nashville Trust Company
and Title Guarantee Loan & Trust Company,
Executors of the Estate of Mrs.
Grace C. Scales, deceased, American
Trust Bldg., Nashville, Tenn.,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 339

STATE OF ALABAMA, BY AND THROUGH ITS STATE TAX COMMISSION, AND HENRY S. LONG, JOHN P. KOHN, SR., AND W. W. RAMSEY, MEMBERS THEREOF, AND NASHVILLE TRUST COMPANY AND TITLE GUARANTEE LOAN & TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF MRS. GRACE C. SCALES, DECEASED,

Appellants,

vs.

WALTER STOKES, JR., AS COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE,

Appellee.

STATEMENT OF BASIS ON WHICH THE APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, the above appellants file this their statement showing the basis on which said appellants contend that the Supreme Court

has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

I.

The statute believed to sustain appellate jurisdiction is Section 237 of the Judicial Code of the United States, Section 344 of Title 28 of the United States Code, which provides that "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity * * * may be reviewed by the Supreme Court", and further providing that "if an appeal be improvidently sought and allowed under this Section in a case where the proper mode of invoking a review is by writ of certiorari * * * the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari."

II.

The judgment appealed from was entered on the 11th day of June, 1938, as appears from page 108 of the record herein, and has been ordered published in Volume 173 of Tennessee Reports.

III.

The application for an appeal was presented on the 30th day of August, 1938, as appears from page 109 of the record herein.

IV.

The appeal herein is from a decree of the Supreme Court of Tennessee in a civil case in equity, rendered pursuant to the Declaratory Judgments Act of the State of Tennessee,

Code of Tennessee 1932, Sections 8835-42. The original bill was filed in the Chancery Court of Davidson County, Tennessee, by the Nashville Trust Company, a Tennessee corporation, and the Title Guarantee Loan & Trust Company, an Alabama corporation, as Executors of the Estate of Mrs. Grace C. Scales who died a resident of Tennessee, against Walter Stokes, Jr. as Commissioner of Finance and Taxation of the State of Tennessee and Henry S. Long and others, members of the State Tax Commission of Alabama, alleging that the taxing authorities of both States were seeking to collect inheritance and death transfer taxes on certain stocks and bonds held in trust since 1917 by the Alabama executor within the State of Alabama. The bill alleged that taxation by both states upon the same property was in violation of the 14th Amendment of the Constitution of the United States and prayed for a declaratory decree as to whether the State of Alabama or the State of Tennessee was entitled to collect inheritance taxes, and to have determined what taxes could be collected by each State.

The State of Tennessee by its Commissioner of Finance and Taxation appeared and asserted that under the inheritance tax law of Tennessee, Code of Tennessee 1932, Sections 1259 and 1260, a tax was levied upon "all of the property" of which Mrs. Scales died possessed, and that since she was domiciled in Tennessee the stocks and bonds held in trust for her by the Alabama trustee were nevertheless taxable in Tennessee. The State of Alabama appeared by and through its Tax Commission and the members thereof, asserted that under the trust agreement the stocks and bonds had acquired a *situs* analogous to the *situs* of tangible personal property for taxation in the State of Alabama, and it made its answer a cross bill and sought to collect the sum of two thousand two hundred two & 42/100 ($2202.42) dol-

lars, with interest, as inheritance tax due the State of Alabama. The Chancery Court decreed that the right and power of taxation rested in Alabama alone, and that the attempt to impose a tax upon transfers by a resident of Tennessee of "all intangible personal property" (Code, Section 1259) is unconstitutional and void under the facts of this case and is a violation of the due process of law clause to the 14th amendment to the Federal Constitution (R. 81). The Commissioner of Finance and Taxation of the State of Tennessee took an appeal to the Supreme Court of Tennessee, assigning as error the Chancellor's decree based upon the unconstitutionality of the Tennessee statute as a violation of the due process of law clause of the 14th Amendment (R. 88) and the Supreme Court of Tennessee reversed the decree of the Chancellor and rendered one establishing the right of the State of Tennessee to tax the inheritance of the bonds, stocks and mortgage participation in Alabama, and holding that the Tennessee inheritance tax law was not in violation of the 14th Amendment, and further that the State of Alabama had no right or power to tax the said stocks, bonds and mortgage participations. This appeal is from the final decree of the Supreme Court of Tennessee to review said decree as appears from page 108 of the record herein.

V.

The cases believed to sustain the jurisdiction are as follows:

N. C. & St. L. R. R. v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730;

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371;

Board of Liquidation v. *La.*, 179 U. S. 636, 45 L. Ed. 352;

Hays v. *Pacific Mail S. S. Co.*, 17 How. 596, 15 L. Ed. 254;

Safe Deposit & Trust Co. v. *Va.*, 280 U. S. 83, 74 L. Ed. 180.

Dated this 6th day of September, 1938.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of the State of Alabama;

RAY RUSHTON,
Special Attorney for the State Tax Commission of the State of Alabama;

CHAS. C. TRABUE, JR.,
Attorney for Nashville Trust Company and Title Guarantee Loan & Trust Company, Counsel for Appellants.

EXHIBIT "A".

For Publication, DeHaven, Judge.

Filed June 11th., 1938.

David S. Lansden, Clerk.

Davidson Equity.

NASHVILLE TRUST COMPANY et al.

vs.

WALTER STOKES, Commissioner, et al.

Opinion.

The question to be determined in this cause is the taxable situs of certain intangible personal property belonging to Mrs. Grace C. Scales, a resident of Tennessee, and placed by her in the hands of the Title Guarantee Loan & Trust Company, an Alabama corporation with its principal place of business at Birmingham in that State, under a trust agreement executed by her in December, 1917, and amended in 1929, naming her son and daughter as beneficiaries.

Mrs. Scales was domiciled in Tennessee for many years and until the time of her death in 1936. Both the State of Tennessee and the State of Alabama asserted the right to levy and collect inheritance or death transfer taxes on the intangibles in the hands of the trustee in Alabama. The bill herein was filed under the Declaratory Judgments Act, and the declaration sought is which of these states is entitled to levy and collect such taxes on the property in question. It is agreed that both States may not tax the property.

It appears that the Title Guarantee Loan & Trust Company had possession of the securities here involved, as trustee, under the provisions of the will of a brother of Mrs. Scales, by the terms of which the securities became the property of Mrs. Scales on the death of the widow of the brother. These securities were never taken from the physi-

cal possession of the trustee of Mrs. Scales, but remained in its possession under the terms of the trust agreement executed by Mrs. Scales in December, 1917. Under this agreement, Mrs. Scales did "grant, sell, transfer, assign and deliver" to the trustee the securities in question, with power to "hold, manage and look after" the same. Mrs. Scales reserved to herself (1) the net income for life; (2) the right to direct the sale of any or all the securities in the trust and reinvestment of the same, but providing that "all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph"; (3) the right to remove the trustee and substitute another, which was never exercised; (4) the right to dispose of all the trust property by last will and testament; and (5) the right to direct any encroachment upon the *corpus* of the trust at any time that in her opinion the net income from the property was insufficient for her comfortable support and maintenance; but by an amendment in 1929 Mrs. Scales extinguished her right to encroach upon the *corpus* with reference to certain bonds of the Pratt Consolidated Coal Company, which bonds constitute the major portion of the trust property.

Mrs. Scales, by last will and testament dated January 1, 1926, made disposition of the securities in the hands of the trustee, and directed that the same remain in the hands of the trustee for the benefit of certain persons named in the will. She appointed the Nashville Trust Company, a corporation, executor "as to all property which I may own in the State of Tennessee at the time of my death; and I appoint the Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as executor of this will as to all property which I may own in the State of Alabama, and also as to all property which I may have the right to dispose of by last will and testament in said state."

The chancellor found and decreed that under the facts set up in the pleadings and admitted by stipulation that the securities in the hands of the Title Guarantee Loan & Trust Company, as trustee, at the time of the death of Mrs. Scales had a legal *situs* analagous to the *situs* of tangible personal property in the State of Alabama and were subject to the

death transfer or successive tax of that state. He further held and decreed that the inheritance tax law of Tennessee in so far as it attempts to impose a tax upon transfer by a resident of Tennessee of "all intangible personal property" (Code 1259) is unconstitutional and void under the facts of this cause as a violation of the due process clause of the 14th Amendment to the Federal Constitution.

From this decree Walter Stokes, Jr., Commissioner of Finance and Taxation of Tennessee, has appealed to this court, and by proper assignments asserts that the chancellor was in error in finding and decreeing as above set out.

State taxation of anything not within its jurisdiction is in violation of the 14th Amendment. Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S., 204, 74 L. Ed., 371. Under the ancient maxim *mobilia sequuntur personam*, the *situs* of personal property is, generally speaking, the domicile of the owner. Blodgett *v.* Silberman, 277 U. S. 1, 72 L. Ed., 749; First National Bank *v.* Maine, 284 U. S. 312, 76 L. Ed., 313. In the latter case, after pointing out that due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the maxim has gradually yielded to the law of the place where the property is kept and used, the court said:

> "But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property."

And in Blodgett *v.* Silberman, *supra*, in determining the taxable *situs* of certain intangibles, the court said:

> "At common law the maxim '*mobilia sequuntur personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and

is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approved itself to legal philosophic test or not."

In First National Bank *v.* Maine, *supra*, the court said:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan & T. Co. Case, *supra*. That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

Were the securities here in question so used in the State of Alabama as to give them a *situs* analogous to the actual *situs* of tangible personal property? We think not. They were not employed in any business of Mrs. Scales, nor was the trustee authorized under the trust agreement to employ the securities in any business of its own, or in any other person's business. Under the terms of the trust, the trustee was to "hold, manage and look after" the securities, under the reserved powers of Mrs. Scales. The trustee had the legal title to the securities, but only for the purposes of the trust. It had no beneficial interest in the trust property, other than a commission of 5 per cent on income in compensation for its services as trustee.

In Farmers Loan & Trust Co. *v.* Minnesota, *supra*, the court said:

"New Orleans *v.* Stempel, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110; Bristol *v.* Washington County, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. Rep. 585, and Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, L. R. A. 1915C, 903, 31 Sup. Ct. Rep. 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business."

As above pointed out, the securities here in question were not employed so as to become a part of any business in Alabama.

Mrs. Scales reserved the right, which she exercised, to dispose of all of the trust property by will. When she died leaving a will disposing of the trust property, the situation was the same as though there had never been a trust. The property passed under the will as the absolute property of Mrs. Scales, a resident of Tennessee. The inheritance tax law of Tennessee with respect to residents of this State imposes a tax upon "all intangible personal property" transferred "by a will." (Code 1259-1260). We are unable to see how on this state of facts Tennessee could be denied the right to levy and collect the tax.

Counsel for the State of Alabama lean heavily on the case of Safe Deposit & Trust Co. *v.* Virginia, 280 U. S., 83, 74 L. Ed., 180. This was a case where the State of Virginia attempted to levy an *ad valorem* tax upon securities in the hands of a trustee in Maryland when no person in Virginia had a present right to their enjoyment or power to remove them. The facts, briefly stated, were that the truster, a resident of Virginia, established a trust with a Maryland corporation as trustee. The trust was for the two infant sons of the truster, each being given a one-half interest. The trustee was to collect the income from the securities and accumulate the net income for the benefit of the two sons, and when each of them reached twenty-five years of age to pay over to such beneficiary his interest in the accumulated sum, both principal and income. If either son died before receiving his share without issue, then the survivor took all. No provision was made for the death of both sons under twenty-five without issue. The trustee was authorized to change the investments. The truster reserved the right to revocation, but died without having exercised it. Administration of his estate was had in Virginia, and his two sons were domiciled there. Except as changed by reinvestment, the trustee had continued to hold the original securities in Baltimore, Maryland, and paid the taxes regularly demanded by the city and state on account of them. The Supreme Court of Virginia sustained the *ad valorem* tax

levied by that state on the securities in Maryland. In reversing this holding, the Court said:

> "Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the trust company—holder of the legal title. That they are property within Maryland is not questioned. De Ganay *v.* Lederer, 250 U. S. 376, 382, 63 L. Ed. 1042, 1044, 39 Sup. Ct. Rep. 524. Also, nobody within Virginia has present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders. They have no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam* is applicable and controlling, * * *
>
> "Ordinarily this court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. Blodgett *v.* Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise. (Citing cases.) Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the *cestui que* trust."

The situation in the instant cause is entirely different from that presented in Safe Deposit & Trust Co. *v.* Virginia. Here the trust terminated on the death of Mrs. Scales, she having exercised her right to dispose of the trust property by will. She was a resident of Tennessee, as were the beneficiaries under her will. No question of double taxation is presented, as was true in the Safe Deposit case.

Our conclusion is that the decree of the chancellor must be reversed and a declaration entered here in accordance with this opinion.

By consent of the parties the costs of the cause will be paid by the Title Guarantee Loan & Trust Company and the Nashville Trust Company, as executors, who filed the bill under the Declaratory Judgments Act.

D. W. DeHaven,
Judge.

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